IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 12 2021 03:13 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

OMNI FINANCIAL, LLC, a foreign limited liability company Appellant,

vs.

KAL-MOR-USA, LLC, a Nevada limited liability company;

Respondent.

No.: 82028

Eighth Judicial District Court
Case No: A-17-757061-C
(Honorable Richard Scotti)

APPELLANT OMNI FINANCIAL, LLC'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities, as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Parent Corporation:
   None.
2. Publicly held company that owns 10% or more of the party's stock:
   None.
3. Law firms who have appeared or are expected to appear for Omni Financial, LLC (including proceedings in the District Court):
   Howard & Howard Attorneys PLLC.

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SUMMARY OF THE ARGUMENT

Respondent Kal-Mor-USA, LLC ("Kal-Mor") argues that Omni Financial, LLC ("Omni") and First 100, LLC ("First 100") agreed to a novation of contract by executing a settlement agreement ("First 100 Settlement") which resulted in the loss of certain Deeds of Trust held by Omni. A single sentence in Kal-Mor's Answering Brief demonstrates the fatal flaw which undermines Kal-Mor's position: "Further, Omni fails to explain how it or First 100's subjective intent is relevant in any way to the District Court's decision, which relied exclusively on the express and uncontroverted language of the First 100 Settlement." [Answering Brief, p. 36]. The law is settled that it is the intent of the parties to an agreement that exclusively determines whether a novation has occurred. Kal-Mor does not cite a single authority in its Answering Brief which would allow a third party (expressly excluded as a beneficiary) to interpret the meaning of an agreement it was not a party to as Kal-Mor does here.

Kal-Mor admits that its argument is not based upon the actual intent of Omni and First 100, but rather, its own subjective interpretation of the terms of the First 100 Settlement. As it did in the District Court, Kal-Mor erroneously focuses solely on its own interpretation of the First 100 Settlement even though it was expressly excluded as a third-party beneficiary [JA Vol. IV, 000997, §20(f)] and by its own

admission was not involved in the negotiation or formation of the First 100 Settlement. [Answering Brief, p. 13]. Even if the Court were to accept Kal-Mor's arguments, one simple question underscores the frivolity of Kal-Mor's position: what if Omni and First 100 did not intend to enter a novation and simply used incorrect language to reflect that intent in the Settlement Agreement? Would Omni and First 100 not be entitled to reform the agreement to better reflect the intent of the parties? According to Kal-Mor the answer is no, the agreement could not be reformed to correct an ambiguity or to make clear the intent of the parties. This form over substance argument must be rejected. By its own admission, Kal-Mor has no knowledge of either Omni or First 100's intent in entering into the First 100 Settlement. Instead, Kal-Mor rests solely upon its own interpretation of the language of the First 100 Settlement and is guessing as to the meaning behind the words. Parties to agreements regularly amend or reform a written agreement to better state their intention or to correct drafting errors. Noteworthy is the fact that Omni and Kal-Mor entered into a separate settlement agreement which expressly reserved all rights regarding the properties at issue herein [Kal-Mor Answering Brief, p. 13; p. 17, n. 10], thus Kal-Mor was fully aware of Omni's intent to maintain its security interest in those properties and provides further evidence that the First 100 Settlement was not intended to be a novation.

A review of the record in this matter demonstrates that Kal-Mor initiated an action on June 19, 2017 against both Omni and First 100. [Complaint, JA Vol I., 00001 - 00024]. Prior to waiting until Defendants had answered and long before a joint case conference was held pursuant to NRCP 16.1 or discovery commenced, Kal-Mor filed a motion for partial summary judgment. [JA Vol. III, 000566 - 000590]. Kal-Mor did not seek to take a default against First 100 despite First 100 not filing an Answer until November 26, 2019. [First 100 Answer, JA Vol. VII, 001593 - 001613]. In short, Kal-Mor raced to the courthouse at the earliest possible time to gain a tactical advantage by seeking summary judgment prior to any discovery occurring or all parties appearing. The District Court erred in not permitting discovery to be performed so that the intent of Omni and First 100 could be determined and presented to the Court for consideration.

Additionally, Kal-Mor's Answering Brief should be stricken in part, or at a minimum ignored, as it has offered argument on matters not before this Court and which are still pending in the District Court. Kal-Mor argues that if this Court finds error in the District Court's granting of summary judgment, the Court should nevertheless uphold the granting of summary judgment based upon Kal-Mor's argument that Nevada's "One-Action Rule" applies. [Kal-Mor Answering Brief, pp. 38 – 45]. Kal-Mor sought summary judgment on this issue [JA Vol III, 00566 - 000590] in the District Court. The District Court did not address this issue. [Kal-

Mor Answering Brief, p. 5]. The denial of a summary judgment is not typically appealable. Likewise, even if the issue was ripe for review Kal-Mor did not file a cross-appeal. It is wholly improper for Kal-Mor to ask this Court to grant it judgment on an issue that is currently pending as an unresolved issue in the District Court.

It should also be noted that First 100 has filed a late Answering Brief in this matter which takes no position on any issue before the Court. As noted, First 100 had not answered at the time of the summary judgment subject of this appeal and therefore was not involved in those proceedings. First 100 has simply taken the position that the First 100 Settlement is unambiguous [First 100 Answering Brief, p. 3] without offering an opinion as to what the terms of the First 100 Settlement mean.

II.

ARGUMENT

A. The Intent of the Parties to a Specific Agreement is Controlling in Determining Whether a Novation Occurred

To demonstrate that a novation has occurred four elements must be shown: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193 (Nev. 1989). A "novation may be defined as a mutual agreement **between the parties concerned** for the discharge of a valid existing obligation . . ." 58 Am.

Jur.2d *Novation* §1 (emphasis added). Even though case law is clear that it is the intent of the parties to the subject agreement that is controlling, Kal-Mor ignores this fact throughout its Answering Brief, to wit:

- Likewise, Kal-Mor has never argued Omni intended to release its security interests in the Kal-Mor Properties when it entered into the First 100 Settlement . . . [Kal-Mor Answering Brief, p. 20]

- However, the only specific issue identified in the Opening Brief on which Omni claims discovery should have been allowed is the subjective intent of Omni and First 100 in entering the First 100 Settlement. *Id.* ***Such intent is irrelevant.*** First, Omni's intent to foreclose on the Kal-Mor properties was never disputed. (Emphasis added)[Kal-Mor Answering Brief, p. 36].

Kal-Mor applies an incorrect analysis to the application of the doctrine of novation. Kal-Mor impliedly assumes that if parties reduce an agreement to writing then that writing controls over the actual intent of the parties. This approach has been expressly rejected. As noted by the Ninth Circuit Court of Appeals and cited in Omni's Opening Brief:

> The conduct of the parties subsequent to the execution of a contract and before any controversy had arisen as to its effect, is persuasive evidence in determining the meaning of the agreement. "This rule of practical construction is predicated on the common sense concept that **actions speak louder than words**." **Words are frequently but an imperfect medium to convey thought and intention**. **When the parties to a contract perform under it and demonstrate by their conduct that they know what they were talking about, *the courts should enforce that intent.***

Fanucchi & Limi Farms, 2003 WL 22670509, *32 – 33 (9th Cir. 2003) (emphasis added); s*ee also* 58 Am. Jur.2d *Novation* §16 (1971).

Kal-Mor does not contest that Omni intended to maintain its ability to enforce its Deeds of Trust. [Kal-Mor Answering Brief, p. 20]. Kal-Mor provides no evidence that First 100 had a different understanding. Thus, if both Omni and First 100 intended to allow Omni to pursue its Deeds of Trust then a portion of the prior agreement between Omni and First 100 remained. If anything remains of the agreement alleged to be the subject of novation, then a novation cannot take place. *Moffet County State Bank v. Todd*, 800 P.2d 1320, 1323 (Colo. 1990).

In a failed attempt to defeat well settled law, Kal-Mor relies upon cases which are factually inapposite. An example of such authority is seen in the case of *Walker v. Shrake*, 75 Nev. 241, 339 P.2d 124 (1959)).. There a dispute arose between parties to an agreement which acted as a replacement for a previously entered judgment. *Id.* at 245 – 246; 339 P.2d at 126. As part of the agreement the party holding the judgment agreed to file a satisfaction of judgment in exchange for receiving a promissory note in an amount twice that of the judgment. *Id.* Nevertheless, that party attempted to execute upon the judgment. Not surprisingly this attempt was rejected by the court as not reflecting the intent of the parties. *Id.* Such facts are not analogous to the matter at issue. It does, however, underscore that it is the actual intent of the parties to the agreement that controls.

B. The First 100 Settlement Constitutes an Executory Accord, not a Novation.

Novation is often confused with executory accords. *See Cohen v. Treuhold Capital Group, LLC*, 422 B.R. 350, 373 (E.D.N.Y. 2010). The difference, however, is critical as an executory accord does not result in the replacement of the original agreement, but rather, provides two avenues of recovery – either the breached accord agreement or the original agreement. Kal-Mor cites *Johnson v. Utile*, 86 Nev. 593, 472 P.2d 335 (1970))for the proposition that an agreement that operates as an immediate substitution for and extinguishment of an antecedent debt is a substituted contract. [Kal-Mor Answering Brief, p. 31]. In other words, a novation. Kal-Mor ignores the pertinent part of this holding which focuses on the fact that whether an agreement acts as a substituted contract or an executory accord is difficult to determine and turns on the intent of the parties to the agreement (not that of a third party such as Kal-Mor):

> The determination of whether the compromise agreement is an executory accord or a substituted contract ***turns on the intent of the parties to it***. As stated by Corbin, supra, § 1293, at 190:
>
> "It is frequently difficult to determine whether a new agreement is a substituted contract operating as an immediate discharge, or is an accord executory, the performance of which it is agreed shall operate as a future discharge. ***It is wholly a question of intention*** to be determined by the usual processes of interpretation, implication or construction [sic]."

86 Nev. at 597, 472 P.2d at 337 (emphasis added). Again, Kal-Mor's own authority

defeats its position.

The First 100 Settlement [JA Vol. IV, 000978 – Vol. V, 000993] reflects a mutual understanding that Omni was not relinquishing any rights to the real properties. This is underscored by the fact that First 100 actively assisted Omni in foreclosing upon the real properties at issue by supplying "lost Note Affidavits" when original documentation could not be located. [JA Vol. IV, 000823, ¶24; JA Vol. V, 001026 – 001028; 001030 – 001031]. Kal-Mor ignores the fact that there would be no purpose in First 100 assisting Omni in foreclosing upon its Deeds of Trust if there had been an intention to fully release all of Omni's rights through the execution of the First 100 Settlement.

C. The Settlement Agreement Cannot Constitute a Novation as the Original Agreement Had Been Breached by First 100.

The "party asserting novation has the burden of proving **all the essential elements**" by clear and convincing evidence. *United Fire Insurance*, 105 Nev. at 509, 780 P.2d at 196 (emphasis). There "cannot be a novation in a case where the original contract has already been breached since a previously valid obligation does not exist at the time the new contract is made." 58 Am. Jur.2d Novation §7, *citing In re Cohen* 422 B.R. 350 (E.D.N.Y. 2010). In granting summary judgment, the District Court determined that the original lending agreement between Omni and First 100 had been breached by First 100. [JA Vol. VI, 001311, ¶12]. Thus, Kal-Mor, as a matter of law, could not prevail upon its motion as it failed to establish the

first element of novation – the existence of an existing, valid agreement. *See United Fire Insurance*, 105 Nev. at 508; 58 Am. Jur.2d Novation, §7. As noted in 58 Am. Jur.2d, §7, the prior valid agreement must exist ***at the time*** the novation is entered into. Thus, while a prior existing contract may be valid for purpose of bringing a breach of contract action, such is not the case for purposes of novation.

Kal-Mor relies on *Williams v. Crusader Discount Corp*. 75 Nev. 67, 334 P.2s 843 (1959) , for the unremarkable position that if two parties enter into an agreement which they later seek to replace with a new agreement a novation will take place. The gravamen of the case however was the holding that a guarantor who does not consent to the novation will not be bound by the novation. 75 Nev. at 70 -71. Such fact is not surprising and is irrelevant. Here, there are no guarantors of a contract at issue.

Kal-Mor's reliance on the case of *Intersal, Inc. v. Hamilton*, 834 S.E.2d 404 (N.C. 2019) is likewise misplaced. Therein, there was no issue that the parties intended to enter into a novation thus the prior agreement was deemed subsumed by the later agreement. Kal-Mor fails to fully set forth the holding in the *Intersal* matter, however, in which the court stated:

> Further, in determining whether a later contract is a novation of a prior contract,
>
> ***[t]he intent of the parties governs***. . . .

> If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, ***and the surrounding circumstances***, if the words do not make it clear, to determine whether the second contract supersedes the first.
>
> If the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs.

834 S.E.2d at 412 (emphasis added). Unlike the present matter in which First 100 continued to assist Omni with foreclosure of its Deeds of Trust arising under the prior, breached agreement, no attempt to enforce an obligation arising from the prior contract existed in *Intersal*. The court's holding makes clear that it is the intent of the parties to the contract at issue that determines whether a novation has occurred, and it is appropriate to look to surrounding circumstances in doing so.

Finally, Kal-Mor relies upon the matter of *AFT Mich. v. State*, 866 N.W.2d 782, 789-90 (Mich. 2015) for the proposition that a breach of a contract does not affect the contract's fundamental validity. The case did not address issues of novation, however. *AFT Mich.* addressed whether or not a contract was deemed "impaired" by virtue of modifications made to Michigan pension laws. The distinction drawn was that a breach of a contract could be addressed through a breach of contract action as opposed to a contract that is "impaired" by law and cannot be enforced and thus effects the contract's validity. *Id.* at 789. This is not analogous to the present matter addressing novation.

D. Kal-Mor Lacks Standing to Attack the Meaning of the First 100 Settlement Agreement

Kal-Mor does not dispute the fact that the First 100 Settlement plainly states that there are no intended third-party beneficiaries of the Settlement Agreement and expressly excludes Kal-Mor. [JA Vol. IV, 000997, §20(f)]. Kal-Mor cannot refute the fact that it has no standing under the First 100 Settlement and makes no attempt to claim that it does. *See Lipshie v. Tracy Investment Co*., 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977) (noting that an individual obtains third-party-beneficiary status when contracting parties demonstrate a clear intent to benefit the individual, a third party, by their contract and only then do they have standing); *Barron v. Bank of N.Y. Mellon*, No. 2:15-cv-00242-APG-GWF (D. Nev. Feb. 15, 2017), p. 2 (one must be a party or third party beneficiary to challenge validity of a contractual assignment).

Oddly, Kal-Mor claims that it is not trying to enforce any right under the First 100 Settlement, attack the validity or enforceability of the First 100 Settlement or advance any interpretation of the First 100 Settlement beyond its plain and obvious meaning. [Kal-Mor Answering Brief, p. 23]. Stated another way, Kal-Mor claims it is not enforcing the First 100 Settlement while asking the Court to enforce its interpretation of the First 100 Settlement. Kal-Mor either has standing to interpret and enforce the First 100 Settlement or it does not. Here, it does not. Kal-Mor is seeking to interpret and benefit from the First 100 Settlement. There is simply no

other way to interpret Kal-Mor's arguments. Kal-Mor claims that it is not seeking to enforce the First 100 Settlement against Omni. [*Id.*]. If that is truly the case, then Kal-Mor's claim fails as a matter of law. The entire premise of Kal-Mor's novation claim is that the First 100 Settlement is an existing and valid obligation with a particular meaning which Omni is bound by. If Kal-Mor were not trying to enforce its interpretation of the terms of the agreement against Omni, then there would be no reason to interpret it at all.

As discussed herein, to establish that a novation has occurred, Kal-Mor, assuming it had standing, would have to demonstrate that the First 100 Settlement was a valid and enforceable agreement at the time of the novation. *Lazovich & Lazovich v. Harding*, 86 Nev. 434, 437, 470 P.2s 125, 128 (1970) . Yet, Kal-Mor claims that it is not attacking the validity or enforceability of the First 100 Settlement. [Kal-Mor Answering Brief, p. 23]. Whether one is attacking an agreement or seeking to uphold an agreement, the result is to interpret and enforce the agreement. It is absurd for Kal-Mor to claim that it is not seeking to enforce an agreement by virtue of not "attacking" it.

Unable to establish standing to raise issues arising from the First 100 Settlement, Kal-Mor argues a non-issue, namely that it has standing to assert a quiet title action against Omni regarding the subject properties. [Kal-Mor Answering Brief, p.21]. This issue is not before the Court. Kal-Mor may institute a quiet title

action if it feels it holds an interest in the subject properties. What Kal-Mor cannot do as part of that action, however, is interpret an agreement from which it is expressly excluded. Such a result undermines the very purpose of contracts, which is to protect the "reasonable expectations of the parties who enter into the bargain, which, in turn, promotes and facilitates business agreements." *Starlite, LP v. Landry's Restaurant, Inc.*, 780 N.W.2d 396, 398 (Minn. Ct. App. 2010).

E. The Granting of Kal-Mor's Motion for Partial Summary Judgment Was Premature and Improper and Omni Was Entitled to Conduct Discovery of the Relevant Issues

As detailed herein, Kal-Mor mistakenly believes that the intent of Omni and First 100 is irrelevant. [Kal-Mor Answering Brief, pp. 20; 36]. Accordingly, Kal-Mor contends that no discovery was required or warranted under the facts and circumstances of this case regarding the parties' intent. Kal-Mor does not dispute that when it filed its Motion, the parties had not discussed discovery and discovery deadlines under NRCP 16.1 and no discovery had occurred in this matter. In fact, when the District Court entered its Findings of Fact and Conclusions of Law on October 2, 2018 [JA Vol. VI, 001307 – 001317] no answers had been filed in the action. First 100 did not file its Answer and appear in the action until November 25, 2019. [JA Vol. VI, 001593 – 001613]. Omni did not file its Answer until August 12, 2019. [JA Vol. VI, 001422 – 001449]. Thus, the District Court disposed of a

primary issue in the case prior to any discovery being afforded or even answers having been filed.

NRCP 56(d) gives the court reviewing a motion for summary judgment broad discretion to deny or continue the motion if the nonmoving party needs time to discover essential facts. *California Union Ins. Co. v. American Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990). Although a party may move for summary judgment at any time district courts should grant a Rule 56(d) motion when the nonmoving party has not had a "realistic opportunity to pursue discovery relating to its theory of the case." *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). In fact, where the nonmoving party has not had the opportunity to discover any information essential to its theory of the case, the Supreme Court has "restated the rule as requiring, rather than merely permitting, discovery." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)(citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 n.5 (1986)).

Omni properly made a request pursuant to NRCP 56(d) for discovery on the various issues outstanding in opposing the Motion for Partial Summary Judgment. [JA Vol. IV, 000815]. In opposing the motion Omni relied upon affidavits of Martin Boone, principal of Omni as well as Robert Hernquist, counsel for Omni, which set forth ample facts requiring discovery. [JA Vol. IV, 000819 – 000824; 001199 –

001201]. Specific discovery that was needed was identified as the deposition of Martin Boone, Jay Bloom, principal of First 100 and Greg Darroch principal of Kal-Mor. [JA Vol. V, 001199]. The need for the discovery is further highlighted by Kal-Mor alleging fraud against First 100 and acknowledging that Kal-Mor took title to the properties subject to Omni's Deeds of Trust. [Kal-Mor Answering Brief, p. 22]. If discovery had been permitted the issues addressed would have addressed the intent of the parties to the First 100 Settlement as well as the negotiations and circumstances surround the execution of the First 100 Settlement.

F. Kal-Mor's Motion Was Procedurally Defective

It is well settled that only *admissible* evidence may be relied upon by the Court in ruling upon a summary judgment demand. NRCP56(c); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, (9th Cir. 2002). In support of its Motion for Partial Summary Judgment, Kal-Mor offered the Declaration of Greg Darroch [JA Vol. III – IV, 000591 – 000784]. As noted in Omni's Opening Brief, Mr. Darroch's Declaration was filled with statements based upon his "information and belief." [JA Vol. III, 000592 – 000605, ¶¶ 3, 4, 5, 7, 10, 17, 24, 31, 32, 38, 45, 46, 52, 53, 59, 60, 66, 67, 72, 75, 84, 87].

As set forth above, and as admitted by Kal-Mor, Kal-Mor is not a party to the First 100 Settlement and has no personal, admissible knowledge of the meaning of the terms used in the First 100 Settlement upon which it based its Motion for Partial

Summary Judgment. Kal-Mor offered no evidence, other than its own, unsupported opinion that the First 100 Settlement means something other than how Omni and First 100 treated it. Having failed to offer anything other than its own opinion, no relevant, admissible evidence was before the District Court which would support the granting of partial summary judgment.

G. Kal-Mor's Arguments Regarding Nevada's One Action Rule Should be Stricken and Ignored by the Court

In violation of NRAP 3(A) Kal-Mor asks the Court to rule upon its claim that Nevada's One Action Rule provides an additional basis to uphold the District Court's granting of summary judgment. An undecided issue pending in the District Court does not constitute an appealable order or issue. As admitted by Kal-Mor, the District Court did not reach the issue of whether the one-action rule would prevent Omni from exercising its rights under its Deeds of Trust in ruling upon Kal-Mor's motion for partial summary judgment. [First 100 Answering Brief, p. 5]. It is well-established that an appeal does not lie from the denial of a motion for summary judgment. *Taylor Construction Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 678 P.2d 1152 (1984)). Simply put, Kal-Mor asks this Court to rule upon a matter in the first instance while that issue is still pending and unresolved in the District Court.

This Court has previously held that it will only consider the record as it was made and considered by the Court below. *Lindauer v. Allen*, 85 Nev. 430, 433, 456

P.2d 851, 852 (1969)). Here, the record is clear that the District Court did not address the application of the one-action rule. The doctrine of harmless error cannot be used to bootstrap and convert an otherwise unreviewable order which is not on appeal, nor ripe for appeal, into a proper issue before this Court.

Further, this Court has consistently refused to consider additional issues raised by respondents in their answering briefs due to the failure to properly raise the issue in a cross-appeal. *See Barton v. DeRousse*, 91 Nev. 347, 351, 535 P.2d 1289, 1291 (1975)); *Sierra Creek Ranch, Inc. v. J. I. Case*, 97 Nev. 457, 460, 634 P.2d 458, 460 (1981)) (respondent argued that the district court erred in refusing to award it attorney's fees and costs; however, since respondent was aggrieved by the district court's refusal to award fees and costs, and sought to increase its rights under the judgment, it was required to file a notice of appeal and the Court did not consider respondent's argument due to this failure). Here, no cross-appeal was filed regarding the District Court's refusal to grant summary judgment on the issue of the one-action rule. The District Court has already declined to grant summary judgment on this issue implying that further proceedings are needed prior to issuing a final order on the issue of the one-action rule.

1. Nevada Law Provides Numerous Exceptions to the Application of the One-Action Rule

To the extent the Court entertains any argument related to this issue there are numerous reasons to reject the contention that the one-action rule is applicable.

Omni filed an extensive opposition regarding application of the one-action rule in the District Court [JA IV – VI, 000785 – 001280]. Kal-Mor relies upon NRS 40.430 to support its claims but in doing so ignores the fact that the one-action rule is littered with exceptions, exemptions, and limitations. The Nevada Legislature has created no fewer than seventeen (17) such exceptions, exemptions, and limitations. *See* NRS 40.430(6). ***Of critical importance here, Nevada's one action rule contains an exception for UCC foreclosure actions***. "As used in this section, an "action" does ***not*** include any act or proceeding…(f) [f]or the exercise of any right or remedy authorized by chapter 104 of NRS [i.e., Nevada's Uniform Commercial Code] or by the Uniform Commercial Code as enacted in any other state." NRS 40.430(6)(f) (emphasis added). Interpreting a similar provision in California law, California courts have repeatedly held that the one action rule does not apply to the personal property component of mixed realty and personal collateral where the personal property is foreclosed in a non-unified sale. *See, e.g., Oxford St. Properties, LLC v. Rehab. Assocs., LLC*, 141 Cal. Rptr. 3d 704, 709 n.4 (Cal. Ct. App. 2012)).

Due to that express carve-out, the one action rule simply does *not* apply here. The prior lawsuit solely and exclusively involved claims relating to a UCC foreclosure over First 100's personal property. [JA Vol. V, 001203 – 01207]. The U.S. District Court only adjudicated rights regarding First 100's *personal property* in the context of *Omni's UCC foreclosure sale*. [*Id.;* Kal-Mor Answering Brief, p.

3]. The prior litigation did not invoke the one action rule because (i) it never involved any real property rights and (ii) Omni never asserted any claims against the borrower for the underlying loan. NRS 40.430(6)(f). Omni was not a plaintiff in those actions—instead it was a defendant in the two separate lawsuits filed by First 100 and Kal-Mor. [JA Vol. IV, 000802]. When Omni did assert counterclaims, it expressly noted that it was *not* asserting claims against First 100 due to the one-action rule, meaning no claim was ever asserted against the borrower for the "recovery of any debt." [*Id.*]. In summary, the exception contained in NRS 40.430(6)(f) squarely governs here, so the one action rule does not apply. Kal-Mor is trying to mislead this Court into concluding that the prior lawsuits (Case No. 2:16-cv-00099 & -00109) involved and settled matters that never came before the Court.

In *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC,* 123 P.3d 748 (Nev. 2005) , the Nevada Supreme Court was faced with a promissory note holder who brought action against a guarantor after a bankruptcy court had voided a recording of a deed of trust and sold the property. The district court entered summary judgment in favor of the holder as exempt from the one-action rule and the guarantor appealed. The Nevada Supreme Court affirmed, holding that the action against guarantor was exempt from the definition of "action" and thus was not barred by the one-action rule.

In *McDonald*, the Nevada Supreme Court carefully studied multiple

exemptions to the one-action rule under NRS 40.430(4)[1], including "whether a creditor [D.P. Alexander] in the position of a sold-out junior lienholder due to a bankruptcy was exempt, under NRS 40.430(4)(i) and (j), from Nevada's one-action rule...." *McDonald,* 121 Nev. at 814. Ultimately, the Nevada Supreme Court concluded that under both NRS 40.430(4)(i) and (j), the creditor's claim was exempt from the one-action rule. *Id.* at 820. In so doing, it opined that:

> [s]tatutory interpretation is a question of law, and our review of the district court's interpretation of the one-action rule is also de novo. When interpreting a statute, we first determine whether the language of a statute is ambiguous. When the language of a statute is clear and unambiguous, we do not look beyond its plain meaning, and we give effect to its apparent intent unless that meaning was clearly not intended.

Id. at 815-16 (footnotes and internal citations omitted). It went on to explain that "the purpose behind the one-action rule in Nevada is to prevent harassment of debtors by creditors attempting double recovery by seeking a full money judgment against the debtor and by seeking to recover the real property securing the debt." *Id.* at 816. Critically, the Nevada Supreme Court went on to explain the origin, use, and importance of the *exemptions* from the one-action rule. It said:

> In 1989, the Legislature, recognizing that the one-action rule can be a trap for the unwary, *enacted and clarified several exemptions from the rule*. These exemptions were included to clarify what the Legislature intended by the word "action." *The Legislature did not intend certain*

[1] NRS 40.430 has been amended several times, with the exemptions moving to subsection 6 in 2011.

> *actions by creditors, spelled out in the exemptions, to fall under the one-action rule.*

McDonald, 121 Nev. at 817 (emphasis added, footnotes and internal citations omitted). The Court noted that "[t]he language of this statute is unambiguous, and the plain language of the statute exempts the present case from the one-action rule…[t]hus, [the] claim is not an action under the one-action rule." *Id.* at 817-18. Ultimately the Nevada Supreme Court stated that "[t]he one-action rule *and its exceptions* are intended to protect debtors by preventing creditors from realizing more than the face value of a debt, ***not to deny a creditor recovery of a legal debt altogether***." *Id.* at 820 (emphasis added).

Kal-Mor ignores NRS 40.430(2). That provision states, "This section *must be construed* to permit a secured creditor *to realize upon the collateral* for a debt or other obligation agreed upon by the debtor and creditor when the debt or other obligation was incurred." NRS 40.430 (2) (emphasis added). Here, however, under the false auspices of seeking to prevent a "double" recovery, Kal-Mor seeks to deny Omni any recovery upon the collateral at issue.

In *Branch Banking & Tr. Co. v. Eloy Bus. Park, LLC*, 112 F. Supp. 3d 1129 (D. Nev. 2015) , the Nevada District Court upheld another exemption in subsection 6 (i.e., NRS 40.430(6)(c)) in ruling that an assignee was not precluded by the one-action rule from bringing a second action on a note to recover a deficiency. That court noted that "as Branch Banking correctly avers, Section 6(c) explicitly exempts

from the one-action rule any act or proceeding '[t]o enforce a mortgage or other lien upon any real or personal collateral located outside of the state which does not, except as required under the laws of that jurisdiction, result in a personal judgment against the debtor.'" *Branch Banking*, 112 F. Supp. 3d at 1137.

In so doing, the *Branch Banking* court cited *McDonald* for the proposition that under Nevada Supreme Court precedent, "the purpose behind the one-action rule in Nevada is to prevent harassment of debtors by creditors attempting double recovery by seeking a full money judgment against the debtor and by seeking to recover the real property securing the debt." *Id.* It went on to explain that "the statutory scheme regarding a deficiency judgment, as a whole, is understood as being built to prevent unjustified windfalls. *Id*. at 1142 (internal citation omitted). The *Branch Banking* court emphasized that in that case, "there is no possibility that Branch Banking will receive a double recovery." *Id.* at 1143; *see also, e.g.*, *Walters v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 723, 729, 263 P.3d 231, 235 (2011) (double recovery not an issue.) In other words, "[t]he One-Action Rule was enacted to prevent double recovery by creditors, ***not to completely deny recovery of a legal debt***. *In re Hart*, 50 B.R. 956, 960 (Bankr. D. Nev. 1985), rejected on other grounds by *In re Pederson*, 875 F.2d 781 (9th Cir. 1989) (emphasis added). No evidence exists in the record that Omni seeks a double recovery.

2. There is Only One "Proceeding" Concerning the Real Property at Issue and Thus the One-Action Rule Does Not Apply

The one-action rule *prohibits* first seeking the personal recovery and then attempting, in an additional suit, to recover against the collateral. *Bonicamp v. Vasquez*, 91 P.3d 584, 586 (Nev. 2004) . Omni has not initiated a second action. There is but one action here, meaning the consolidated case previously pending before the U.S. District Court. [Case No. 2:16-cv-00099]. Kal-Mor was a party to that litigation and signed and approved the interlocutory judgment entered in that matter. Critically, the judgment at issue, by its express terms, provides that in the event of any dispute arising from, or concerning its terms, the Court retained jurisdiction to resolve any issues:

> This judgment shall not preclude or otherwise impair any claim or defense that may exist or arise between or among the Parties with respect to a breach of the Settlement Agreement. The Court hereby retains jurisdiction (over the Parties, the Lawsuit, the Disputes, Claims, Counterclaims, and Third-Party Claims, and the Settlement Agreement (and alleged breaches thereof)), to hear any further proceedings regarding the same, if necessary or appropriate.

[JA Vol. V, 001206]. Yet, in an attempt to misuse the one-action rule to gain and keep possession of property subject to Omni's interests, Kal-Mor—not Omni—improperly started a second action. Kal-Mor did so to artificially create a second action appearing to invoke NRS 40.430. In doing so, Kal-Mor violated the terms of the Stipulated Judgment which it entered into by initiating a new action in state district court, no doubt as a means of seeking to escape from the terms of the

Stipulated Judgment. Such gamesmanship is not in keeping with the underlying policy purposes of protecting debtors against harassment and should be rejected by this Court.

3. There Was No Final Judgment Here (Because There Was No "Judgment Which Imposes Personal Liability on The Debtor for The Payment of Money and Which May Be Appealed Under the Nevada Rules of Appellate Procedure"), And Thus the One-Action Rule Does Not Apply

The Nevada one-action rule only applies when a "final judgment" has been rendered. *See* NRS 40.430 & 40.435. The term "final judgment" is a legal term of art. It is defined as "a judgment which imposes personal liability on the debtor for the payment of money and which may be appealed under the Nevada Rules of Appellate Procedure." NRS 40.435(4). Moreover, for the one-action rule to apply, the initial judgment "must be rendered for the amount found due the plaintiff." NRS 40.430(1) (emphasis added).

In addition to other deficiencies with its argument, Plaintiff appears to be focusing on (albeit still misapplying) the terms "final judgment" and "judgment" in NRS 40.435(4), but wholesale ignoring the word "and" and the clause "which may be appealed under the Nevada Rules of Appellate Procedure." The "Stipulated Judgment" upon which Kal-Mor bases its Motion does not constitute a final, appealable judgment as defined by NRS 40.435(4) as it does not establish a final amount of damages due and owing to Omni. It thus leaves issues that may need to

be addressed in the future. In support of its argument, Kal-Mor wrongly alleges that in connection with the First 100 Settlement, the District Court entered a Stipulated Judgment on February 16, 2017 in the First 100 Action through which it entered final judgment in favor of Omni and against First 100 in the amount of $4.8 million for the remaining balance of the Omni Loan (the "First 100 Judgment") and dismissed all claims, counterclaims, and third-party claims asserted in the First 100 Action with prejudice, reserving only the rights of the parties to enforce the First 100 Settlement. [Kal-Mor Answering Brief, pp. 42]. Kal-Mor's characterization is inaccurate, incomplete, and misleading. The Stipulated Judgment does not contain a final, liquidated damage amount as alleged by Kal-Mor. The Stipulated Judgment actually states:

> First 100 owes Omni a stipulated judgment debt in the amount of Four Million Eight Hundred Thousand Dollars (USD $4,800,000), ***but which amount could increase by a specific sum if certain conditions subsequent are not met***.

[Stipulated Judgment, JA Vol. V, 00125, ¶1] (emphasis added). Kal-Mor's misrepresentation of the language used in the Stipulated Judgment is critical. The "amount due" to Omni is not set forth in the Stipulated Judgment and is subject to further revision by the Court. In fact, the judgment is really more akin to a final order entered for purposes of closing the matter on the court's docket as opposed to entry of a final, appealable judgment.

The Nevada Supreme Court has determined that a settlement accompanied by conditional dismissal of litigation is not a "final judgment." *Nevada First Nat'l Bank v. Lamb*, 271 P. 691 (Nev. 1928) . In determining whether an order or judgment is final and appealable, courts must not adopt a form over substance analysis, but rather, must focus upon the underlying substance of the document and what was actually sought to be accomplished. *Id*. In *Nevada First Nat'l Bank* the Nevada Supreme Court addressed whether the entry of a judgment for damages constituted a "final judgment" for purposes of appeal. Id. In that matter, the district court entered a judgment awarding the plaintiff damages and in doing so stated:

> And it is further ordered and adjudged that this judgment be entered without prejudice, and expressly saving and reserving any and all rights of plaintiff to further proceed against said defendant for the enforcement of payment of any balance claimed to be due by plaintiff from said defendant.

Id., 51 Nev. at 166. The Nevada Supreme Court analyzed this judgment and held it could not be deemed final:

> A judgment or decree is final that disposes of the issues presented in the case, determines the cost, and leaves nothing for the future consideration of the court. When no further action of the court is required in order to determine the rights of the parties in the action, it is final; when the cause is retained for further action it is interlocutory.

Id. at 168 (emphasis added). Similarly, here, the judgment in this matter states that the stipulated judgment would be for the sum of $4,800,000, but which amount may increase.

It should be noted that the U.S. District Court expressly retained jurisdiction over not just the Stipulated Judgment, but also over the "Parties, the Lawsuit, the Disputes, Claims, Counterclaims, and Third-Party Claims, and the Settlement Agreement (and alleged breaches thereof)". [JA Vol. V, 001206, ¶6]. Thus, although Kal-Mor argues Omni's only rights are related to enforcement of the First 100 Settlement, the plain language of the Stipulated Judgment demonstrates that otherwise. The Court expressly included not just the Settlement Agreement but also all of the underlying claims among the parties, which would include those upon which Kal-Mor now seeks to have adjudicated pursuant to the one-action rule.

III.

CONCLUSION

Based upon the facts and law set forth above, Appellant hereby requests that the Court reverse the Order granting partial summary judgement issued by the District Court and remand the matter for further proceedings on the merits.

Dated this 12th day of August 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word version 2016 in 14pt Times New Roman Font; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of August 2021.

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I hereby certify that on the 12th day of August 2021, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was served by the following method(s):

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